United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7387

United States Court of Appeals

For the Second Circuit

Superintendent of Insurance of the State of New York, as Liquidator of Manhattan Casualty Company,

Plaintiff-Appellee,

v.

Bankers Life and Casualty Company, Irving Trust Co., Belgian American Banking Corporation, Belgian American Bank & Trust Company, Garvin Bantel & Company, New England Note Corporation, The Estate of George K. Garvin by Ruth N. Garvin, The Estate of James P. Begole, by Patricia C. R. Begole, as Executrix, John F. Sweeney, The Estate of Standish T. Bourne, by Standish T. Bourne, Jr.,

Defendants-Appellees,

and

Harry Berg and Florence H. Brandenburg, Executrix,

Intervenors-Objectors-Appellants.

On Appeal from the United States District Court
for the Southern District of New York

PLAINTIFF-APPELLEE'S BRIEF

JOSEPH J. MARCHESO
Attorney for Appellee
Office and P. O. Address
1251 Avenue of the Americas
New York, New York 10020
Telephone: (212) 246-7800

Of Counsel:
Morton J. Schlossberg

Bar Ass'n Steno Serv. (Appeals Section) 212-687-0384

Table of Contents

Table of Authorities

Cases (cont'd) — Page

Statutes:

Statutes (cont'd):

Others:

QUESTIONS PRESENTED

1. Was the State Court the proper and only forum to decide the fairness and reasonableness of the settlement?

2. May the Federal District Court review the findings of the State Courts that appellants were not deprived of their due process rights?

3. Are appellants entitled to intervene in the Federal Court proceeding to challenge the adequacy of the settlement?

4. Should damages be awarded to appellee Superintendent?

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AS LIQUIDATOR OF MANHATTAN CASUALTY COMPANY,

Plaintiff-Appellee,

v.

BANKERS LIFE AND CASUALTY COMPANY, IRVING TRUST CO., BELGIAN AMERICAN BANKING CORPORATION, BELGIAN AMERICAN BANK & TRUST COMPANY, GARVIN BANTEL & COMPANY, NEW ENGLAND NOTE CORPORATION, THE ESTATE OF GEORGE K. GARVIN by RUTH N. GARVIN, THE ESTATE OF JAMES P. BEGOLE, by PATRICIA C. R. BEGOLE, as EXECUTRIX, JOHN F. SWEENEY, THE ESTATE OF STANDISH T. BOURNE, by STANDISH T. BOURNE, JR.,

Defendants-Appellees,

-and-

HARRY BERG and FLORENCE H. BRANDENBURG, EXECUTRIX,

Intervenors-Objectors-Appellants.

BRIEF FOR PLAINTIFF-APPELLEE

Statement of the Case

The present appeal of the so-called "Intervenors-Objectors" (so designated because, in fact, these parties were neither intervenors nor objectors in the court below having no standing) is a striking example of the abuse rather than the use of the judicial process. In spite of the fact that this hard fought litigation took almost

ten years before a settlement was reached, the moving parties have succeeded in delaying the distribution to the creditors of Manhattan for more than an additional three years.

The settlement agreement now under attack by appellants has been approved and found to be fair and reasonable by no less than 15 present or former members of the judiciary. Unfortunately, this has not deterred counsel in what appears to be a never-ending quest to raise and reraise issues heard and determined by four different courts.

This Court should not be impressed by the length or effort apparently put into appellants' brief. Indeed, these papers are almost a verbatim copy of the motion papers submitted to the Court of Appeals of the State of New York on appellants' motion for leave to appeal to that Court.

One can readily appreciate counsel's dismay at having failed to achieve his anticipated results. However, he has had his day in court in the Supreme Court, New York County, the Appellate Division of the First Department, the Court of Appeals of New York and the District Court. What he now seeks is nothing less than a relitigation of the issues decided adversely to him four times over.

It may be helpful to the Court to briefly summarize the events which have occured, particularly since the

"objectors" first appeared. In June 1972, the then counsel for the Superintendent of Insurance, Arnold Bauman, reached a settlement agreement with the defendants whereby the action was settled for $1,000,000. An application was made to the Supreme Court, New York County, as required by the Insurance Law, for approval of that settlement. At that point two objectors appeared, Florence H. Brandenburg, Executrix of the Estate of Matthew Brandenburg, claiming to be the sole stockholder of MCC, and Harry Berg who had a claim under a Workmen's Compensation policy issued by MCC prior to its liquidation.

Of course, this was not the first attempt by the Brandenburg interests to participate in this litigation. On March 21, 1966, Matthew Brandenburg commenced an action in the District Court against defendants-appellees Irving Trust, Belgian American (predecessor to European American), Garvin, Bantel & Company, Garvin and New England Note. On September 26, 1967, Judge Wyatt dismissed this action as to Garvin, Bantel. An appeal from that dismissal was taken and subsequently dismissed for lack of prosecution. On May 10, 1968, Irving Trust moved to dismiss and the motion was granted without opposition. On June 19, 1968, the action against Belgian American was discontinued by stipulation

and on October 17, 1969, Brandenburg filed a notice of voluntary dismissal against Garvin and New England Note.

On the same day as the federal action was commenced by Brandenburg, he instituted an identical action in Supreme Court, New York County. The defendants in that action moved under the CPLR for a dismissal of that action and the motion was granted by default on the same day that the Superintendent's application for approval of that settlement was heard.

As a result of the position taken by appellants, Judge Markowitz entered an order on January 2, 1973 appointing former Supreme Court Justice Samuel M. Gold as Special Referee to conduct hearings and report on the fairness and reasonableness of the settlement. Hearings were held and although appellants were represented they called no witnesses on their behalf. Although given the opportunity to submit memorandum, appellants did not do so, and on June 4, 1973 Judge Gold filed a lengthy and well-reasoned report finding the settlement to be fair and reasonable (A-171).

Thereafter, on September 25, 1973, Judge Markowitz rendered a decision confirming the report of Judge Gold (A-159) and on October 23, 1973 an order was signed confirming the Referee's report (A-152).

Appellants then appealed to the Appellate Division,

First Department, and on September 17, 1974 the Appellate Division, without opinion, unanimously affirmed the order of Judge Markowitz. Appellants then moved in the Appellate Division for leave to reargue or for leave to appeal to the New York Court of Appeals. On November 21, 1974, again without opinion, the Appellate Division unanimously denied this motion.

Appellants then moved in the New York Court of Appeals for leave to appeal, and on February 12, 1975 this motion was denied. Appellants have exhausted their remedies in the state courts, each of which, including the highest court of the state, has affirmed the reasonableness and fairness of the settlement reached in June of 1972.

In the interim, on November 19, 1974, counsel for appellants filed a notice in the District Court, which on its face appeared to have no basis under the Federal Rules of Civil Procedure. The Court then directed that appellants make appropriate motions, which they did on February 6, 1975 (A-34). The omnibus motions were denied (A-5) and the Order appealed from entered on June 17, 1975 (A-2).

ARGUMENT

POINT I

THE STATE COURT PROPERLY DETERMINED THE REASONABLENESS OF THE SETTLEMENT; THE FEDERAL COURT IS WITHOUT JURISDICTION TO MAKE THAT DETERMINATION.

The factual background of the events which gave rise to the institution of this action in 1963 have been fully set forth in the opinions of the courts dealing with the jurisdictional question, and for the sake of brevity they need not be repeated herein. See Superintendent of Insurance v. Bankers Life & Casualty Company, 300 F. Supp. 1083 (S.D.N.Y. 1969), aff'd, 430 F.2d 355 (2d Cir. 1970), rev'd, 404 U.S. 6 (1971).

Appellants' attack on the jurisdiction of the state court to approve the settlement herein was perfectly summarized and responded to by the court below:

> "Movants then argue that because the state court lacks subject matter jurisdiction of the § 10(b) claim, any final decision of the state court approving a settlement of the § 10(b) claim should not have res judicata effect in the federal court.
>
> "This is a non sequitur of the worst sort. While the state court cannot adjudicate a § 10(b) claim, it can adjudicate the reasonableness and propriety of the exercise of his discretion by the State's fiduciary in settling such claim." (A-21).

The role of the state court in this proceeding was established on May 24, 1963, when an order was entered

pursuant to Section 514.2 of the Insurance Law appointing the Superintendent the Liquidator of MCC and vesting him with title to all of its property, contracts and rights of action. The fact that the Superintendent commenced an action in the federal court did not deprive the Supreme Court of its over-all jurisdiction in the liquidation of MCC.

The entire statutory scheme involving the liquidation of insurance companies revolves around the jurisdiction and supervision of the Supreme Court. Thus, Section 526 of the Insurance Law authorizes commencement of liquidation proceedings by an application to the Supreme Court. Section 514 fixes the rights and liabilities of interested parties as of the date of the entry of the order directing liquidation in the county clerk's office. Section 539 permits the Superintendent to compromise debts or claims "subject to the approval of the court." Section 528 dealing with injunctions provides that the duration thereof shall be subject to the court before which the application for a liquidation order is returnable, again, the Supreme Court.

The clear purport of the statutory provisions is that the Supreme Court is vested with the exclusive jurisdiction over all matters pertaining to the liquidation of MCC and, particularly, Section 539 required the Superintendent

to obtain the approval of that court in settlement of the claims against the defendants in the actions brought in both the state and federal courts.

No attempt was made by the Superintendent to vest the state court with jurisdiction to determine a claim brought under the Exchange Act of 1934. Indeed, the Superintendent commenced his action in the federal court and the jurisdiction of that court was ultimately decided in the Superintendent's favor by the Supreme Court of the United States. What he sought was only a determination that the settlement of his action was fair and reasonable and this determination can and must be made only by the state court.

As is stated in the Matter of Knickerbocker Agency (Holz), 4 N.Y.2d 245 (1958), "The Supreme Court with the agency of the Superintendent of Insurance, was intended to have exclusive jurisdiction of claims both for and against an insurance company in liquidation."

> "Experience has demonstrated that, in order to secure an economical, efficient, and orderly liquidation and distribution of the assets of an insolvent corporation for the benefit of all creditors and stockholders, it is essential that the title, custody, and control of the assets be intrusted to a single management under the supervision of one court. Hence other courts, except when called upon by the court of primary jurisdiction for assistance, are excluded from participation. This should be particularly true as to proceedings for the liquidation of insolvent insurance companies." Matter of Knickerbocker Agency, supra,

> 4 N.Y. 2d at 252, quoting from Motlow v. Southern Holding & Securities Corp., 95 F.2d 721, 726 (8th Cir. 1938).

Thus, in matters concerning liquidation, " ... another court should not be permitted to interfere with the jurisdiction of the court in which the liquidation proceeding is pending ...." Matter of Knickerbocker Agency, supra, at 4 N.Y.2d at 253; see also In Re National Surety Co., 176 Misc. 53, 26 N.Y.S.2d 370 (Sup. Ct. N.Y. Co. 1941).

This rule has been applied to at least one case in which a liquidator sought approval of a settlement pursuant to a state statute in the Federal District Court in which he was prosecuting a claim on behalf of a company in liquidation. Katin v. Apollo Savings, 318 F. Supp. 1055 (N.D. Ill. 1970). In declining to give its approval to a settlement proposed by a state-oriented liquidator without the express prior consent of the appointing state court, the federal court stated:

> "Under settled principles best expressed by the Supreme Court in Pennsylvania v. Williams, 294 U.S. 176, 55 S.Ct. 380, 79 E.Ed. 841 (1935) federal courts are admonished not to interfere with these dissolutions, though we may have 'abstract' jurisdiction over the subject matter of certain claims." Id. at 1061.

In remanding the settlement proceedings, the federal court, noting that in matters of settlement it was "subject to the supervision of the state court", id. at 1061, found that

the appointing court " ... has the ultimate responsibility to supervise the administration of this receivership and approve any settlement we might reach in this court." Id. at 1058.

Thus, while the Superintendent was required by state law to obtain approval of the settlement in the state court, he was free to dispose of the federal action by simply executing a stipulation of settlement pursuant to Rule 41 of the Federal Rules of Civil Procedure. Appellants disagree and contend that the federal court cannot authorize settlement unless it first weighs the probabilities and possibilities of victory at a trial against what is being proposed in the settlement. (See Appellants' Brief, p. 7, and cases cited therein.)

The cases on which appellants rely are all either class actions or derivative actions brought pursuant to Rule 23(e) or 23.1 of the Federal Rules of Civil Procedure. It is clear, however, that the present action cannot possibly be deemed to be a class or derivative action.

Treatment of an action as a class or derivative action under Rules 23(e) and 23.1 is appropriate only when the action can legitimately be classified as such. It is abundantly apparent that the action before the Court cannot possibly be deemed to be a class or derivative action.

The fundamental principle involved is that an action cannot proceed as a class or derivative action unless the complaint pursuant to which it was brought sets forth the necessary basis in law. United States v. Preston, 352 F.2d 352, 356 n. 10 (9th Cir. 1965); Bell v. Preferred Life Assur. Soc., 131 F.2d 516 (5th Cir. 1942). See also, United States v. Communist Party of United States, 209 F. Supp. 132 (S.D.N.Y. 1962); Johnson v. Riverland Levee Dist., 117 F.2d 711 (8th Cir. 1941). It has also been held that a court cannot rewrite a complaint to "convert the suit which [a plaintiff] has brought as an individual suit on his own behalf into a class suit." Bell, supra at 518.

Further, the only possible way in which appellants could be considered as representatives of a class is to accept the contention that they represent creditors of Manhattan. The answer to the claim of representation of creditors is that the Superintendent himself is vested by operation of law with the representation of creditors. Section 514 of the New York Insurance Law provides in part that, upon liquidation of an insurance company, the Superintendent of Insurance shall be vested with all rights and claims of the corporation, and this was recognized by the Supreme Court, New York County, in the order of liquidation. See also, In re Westchester

Title & Trust Co., 170 Misc. 869, 10 N.Y.S.2d 190 (Westchester County, 1939).

In addition, as creditors, appellants would have no cause of action which they could assert in this case because creditors were neither purchasers nor sellers of securities, a requirement for the maintenance of a suit under Section 10(b) of the Securities Exchange Act. Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir.), cert. denied, 343 U.S. 956 (1952). That doctrine was carefully not rejected by the Supreme Court in this case, the Court holding only that plaintiff could sue for Manhattan, inter alia, for the benefit of creditors as well as the Corporation. Supt. of Ins. v. Bankers Life, 404 U.S. 6 (1971).

Appellants have further alleged that they represent the taxpayers of the State of New York. They argued to the court below that the Insurance Law, Vehicle and Traffic Law and Workmen's Compensation Law provide for the creation of funds out of taxpayers monies, which funds were used to satisfy claims against MCC and that the settlement would be insufficient to reimburse these funds.

Appellants' description of these funds could not be further from the facts. Sections 330 and 333 of the Insurance Law, Section 108 of the Workmen's Compensation Law,

and Section 363 of the Vehicle and Traffic Law all provide for the creation of special funds out of assessments made against insurance companies doing business in the State of New York or by contributions made by such insurance companies. In short, no taxpayers' money or general funds of the State of New York have been used in connection with the satisfaction of claims against MCC.

While in our view it was not necessary to do so, the court below rejected appellants' claim as a taxpayers' representative citing to cases which hold that taxpayers lack the standing to sue errant officials to prevent waste or review their conduct (A 18-20). Appellants now argue that this right has been given to taxpayers in Boryszewski v. Brydges, N.Y. Ct. of Appeals, July 2, 1975, N.Y. Law Journal, July 30, 1975, p. 1. We do not read this recent holding as broadly as appellants do. As the Court stated:

> "We hold today that a taxpayer has standing to challenge enactments of our State Legislature as contrary to the mandates of our State Constitution."

There is nothing in the Court's opinion which indicates a departure from well-settled state law that a taxpayer may not challenge the expenditure of funds unless such expenditure is illegal or involves a local government. (General Municipal Law, Section 51.)

Regardless of what the precise holding is in Boryszewski it has no application herein for the simple reason that no taxpayers funds are involved. Further, if standing is available, appellants are free to commence an action against the Commissioner of Taxation and Finance who administers the fund. What is certain is that whatever claim appellants may have as representatives of the taxpayers (and we submit they have none) cannot and should not be asserted in these settlement proceedings.

Finally, appellants argue that the approval of the District Court to the settlement is required since this is a stockholders' derivative action. Nothing could be further from the truth.

The Superintendent had begun his investigation of Manhattan early in May 1963. Subpoenas had been sent to James Begole and others directing them to appear before the Superintendent on May 16, 1963. Begole had retained Brandenburg, who arranged for an adjournment of Begole's appearance before the Superintendent. Subsequently, on May 17, 1963, the stock of Manhattan was transferred by Begole to Brandenburg in payment of legal services past rendered and to be rendered.

The Supreme Court has found that "as a result [of the fraud], Begole owned all the stock of Manhattan,

having used $5,000,000 of Manhattan's assets to purchase it." 404 U.S. 8. In short, Begole obtained the stock of MCC by virtue of a fraud committed by him and as to this the evidence is irrefutable.

Assuming that Begole had not assigned his stock to Brandenburg, he would have no standing to object to the settlement and surely no right to participate in any distribution since the law does not reward wrongdoers for their illegal acts. As assignee of the tainted stock, Brandenburg can be in no better position than the assignor and this is particularly true where as here Brandenburg, as Begole's attorney, must have had knowledge of the fraudulent acquisition by Begole at the time of the assignment.

It has been held that "the assigness' rights depend on those of the assignor." State Bank of Albany v. Dan-Bar, 12 A.D.2d 416, 212 N.Y.S.2d 386 (3d Dep't 1961). Also, "since the assignee's ... rights are derivative, it may not receive what the assignor could not." M.F. Hickey Co. v. Imperial Realty Co., 73 Misc. 498, 342 N.Y.S.2d 186 (App. T. 1st Dep't 1972).

Appellants did not submit a proposed complaint in intervention, and accordingly we must assume that the complaint which the Estate of Brandenburg would assert is

similar to one previously filed in the court. In that complaint Brandenburg asserted that the wrongs complained of occurred between January 1962 and January 1963, but admitted that he did not acquire ownership of Manhattan's stock until May 17, 1963, after he had apparently been retained as counsel for James F. Begole. Curiously, the complaint in that action was signed by Brandenburg himself rather than by his counsel as is required under Rule 11. That pleading by Brandenburg thus establishes that he was not a shareholder at the time of the actions challenged in this case, and thus was precluded from bringing suit by Rule 23.1, F.R.C.P.

Further, the Estate of Brandenburg, whose rights have devolved from the decedent, is foreclosed by res judicata from asserting any claim in intervention. As set forth in the dismissals of complaints both in the District Court and in the New York Court, Matthew Brandenburg had his days in court asserting all of the claims now suggested and these claims were dismissed with prejudice.

In summary, no attempt was ever made to vest the state court with jurisdiction to determine a § 10(b) claim. The action was settled and the Superintendent did no more than seek approval of the settlement, as he was required to do in the state court. Had appellants not interposed

their baseless motions in the federal court the action would have been terminated pursuant to Rule 41 by voluntary dismissal. The action was not and never has been a class or derivative action, and none of the arguments advanced by appellants can change that fact.

The court below properly rejected appellants' efforts to obtain the intervention of the court into the settlement and dismissal of the action. The determination below should be affirmed.

POINT II

APPELLANTS WERE NOT DEPRIVED OF THEIR DUE PROCESS RIGHTS IN THE STATE COURT; THE FEDERAL DISTRICT COURT MAY NOT REVIEW THE FINDINGS OF THE STATE COURT.

Desparate is too kind a word to define the argument set forth in Point II of appellants' brief. Although it is stated at page 6 of appellants' brief, in the footnote, that they will not argue the merits of the settlement, appellants proceed to do precisely that at pages 28-33. Of course, this should not be too surprising since the arguments there advanced are a verbatim reproduction of the arguments made to the Appellate Division, First Department, and the New York Court of Appeals.

In challenging the competency of the evidence produced to support the Superintendent's claim that the settlement would be sufficient to pay the claims of all creditors, counsel for appellants has made serious and highly irresponsible charges. He has accused the Superintendent and those of his staff of "making evidence," "manufacturing figures," "manipulating the reserves," and other baseless charges of similar ilk. Unsupported charges of this type calls for the most severe condemnation and censure.

The evidence concerning the adequacy of the reserves on open claims is fully summarized by the Referee (A 217-220) and need not be repeated here. This review was conducted by a team of experts who had from 23 to 40 years experience in claims work (A 62-64). Each open matter was reviewed for liability, whether a suit had been filed, a bill of particulars, hospital records, social status of the claimant and all other factors relevant to fixing a proper reserve for each particular claimant (A 65). Peterman, who was in charge of this review, testified that in his opinion the reserves established were more than adequate to satisfy all open items (A 73).

Appellants have erroneously relied on the decision in Stewart v. Citizens Casualty Company of N.Y., 23 N.Y.2d 407 (1968). In challenging the adequacy of the reserves in

Stewart, the issue before the Court was whether or not the insurance company was solvent, and the company sought a hearing to determine the issue of solvency including the effect thereon on the established reserves. Involved in that case was Section 526 of the Insurance Law, which had no bearing on the present proceeding. So substantial was the evidence here produced before the Referee on the adequacy of the settlement to satisfy in full all of the claims of creditors that the Referee's Report itself, which sought to summarize this evidence, encompasses 16 pages (A 204-220).

Appellants' argument that they were denied cross-examination with respect to the amount of each claim is without merit. Obviously, there is no relationship between the amount of each claim (generally overstated) with the reserve fixed. Suffice it to say that each claim was reviewed by a competent expert and a proper reserve established based on that review.

Appellants make no serious challenge to the evidence presented on the adequacy of the settlement. It is only by means of innuendo and surmise that the weakest kind of challenge is made. The state courts correctly disregarded the baseless accusations made by the appellants. These charges are not worthy of the color of truth and should be equally summarily rejected by this Court.

We submit that it is not even necessary for this Court to consider any of these arguments. We are compelled, however, to bring to the attention of the Court the fact that counsel for appellants persists in making an argument which he knows to be without any factual support.

Appellants argue at page 29 of their brief that based upon the decline of stock values the securities held for the account of the creditors of MCC "must have declined by 48 percent." Appellants made this precise argument in seeking leave to appeal from the Appellate Division. In opposition to that motion counsel for the Superintendent submitted an affidavit stating that the value of the securities had in fact increased by over $370,000 between December 31, 1972 and September 30, 1974.

Did this deter counsel for appellants? No. Again he made his "48 percent decline" argument to the New York Court of Appeals in seeking leave to appeal. Once more the Superintendent responded that because the investments were largely in certificates of deposit the stock market decline had no effect on the value of the assets held for distribution.

Was counsel yet convinced? No. Once more in the court below he again charged the Superintendent with a 48 percent loss. This time the court was advised that as of

December 31, 1972 the cash and securities held for the creditors of MCC totalled $6,605,000, and as of February 13, 1975, the value had increased to $7,410,620. Was this enough to convince counsel? No, indeed. Once more, for the fourth time, he repeats his same argument.

Appellants' argument that they were denied due process in the state court is defied by a reading of the Referee's Report (A-171). It is abundantly clear that appellants were given every opportunity to challenge the adequacy of the settlement. It is equally clear that the evidence submitted by the Superintendent was more than sufficient for the Referee, a former justice of the New York Supreme Court, to make his determination. Finally, it cannot seriously be challenged that the Referee made a careful and thorough analysis of all the evidence before reaching his conclusions.

There remains one final and certainly a conclusive response to appellants' arguments. As the court below properly held, the federal court lacks jurisdiction to review state court determinations of federal constitutional questions (A-28).

Appellants now argue that the holdings in Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) and Tang v. Appellate Division, 487 F.2d 138 (2d Cir. 1973) are not applicable.

They are in error. Appellants argued in the New York Supreme Court, the Appellate Division and the New York Court of Appeals that they were denied due process both in the hearings before the Referee and in the determination of the state courts. There can be no dispute that the constitutional issue of due process, rejected by all the state courts including the highest court of the state, could be reviewed by the United States Supreme Court pursuant to 28 U.S.C. § 1257.

Appellants elected to intervene in the state court proceeding in which the Superintendent sought approval of the settlement. They elected to raise the constitutional due process issue and pressed it to the highest court of the state. Appellants were required to seek review of their contentions in the Supreme Court only and the court below properly rejected the due process question as beyond its jurisdiction.

Assuming, arguendo, that the court below did have jurisdiction to review the findings of the state courts, we submit that appellants have utterly failed in their attempt to demonstrate any deprivation of their due process rights.

POINT III

APPELLANTS ARE NOT ENTITLED TO INTERVENTION IN THE FEDERAL COURT.

In the court below appellees argued that appellants could not properly intervene in this action. Appellant Brandenburg has no standing since the stock of MCC was originally acquired by fraud and the present holder is in no better position than the defrauder to assert a claim. Appellant Berg has a claim under a workman's compensation policy and it is not disputed that there are sufficient funds now available, even without the settlement, to pay his claim in full. (He was awarded $2,500 by a referee and is appealing that finding; his claim was for $79,000 and a reserve in that amount has been set up should he prevail on appeal.)

Neither appellant represents the creditors of MCC since the Superintendent has represented to the Court that sufficient funds are available to pay all creditors in full, and further, the Superintendent, pursuant to his appointment as Liquidator of MCC, is charged with representing all creditors. For the reasons previously set forth, the taxpayers have no interest in the assets or affairs of MCC.

Directing ourselves now specifically to Rule 24 of the Federal Rules of Civil Procedure, it is apparent that appellants do not claim a right to intervene based upon any statute. It would also appear that no claim is made based on Rule 24(b)(2). Thus, the only possible basis for intervention would be under Rule 24(a)(2). Here, appellants must show that their interest is not adequately represented by the Superintendent.

In United States v. International Telephone & Tel. Corp., 349 F. Supp. 22 (D.C. Conn., 1972), the Court defined this showing thusly:

> "The potential obstruction and delay which may be caused by allowing a person to intervene as a party to a suit fully justify the requirement that he make a clear showing rather than a mere allegation that his interest is not adequately represented by an existing party to the suit." 349 F. Supp. 27, Note 4.

The fact that appellants may not agree with the settlement of this case for one million dollars does not constitute the clear showing that their interests are not adequately represented. As we have previously urged, we do not believe that any of the alleged intervenors have any interest to be protected in this action. Even assuming, arguendo, that they do, the fact that the highest court of New York has approved the settlement and rejected the arguments advanced by appellants constitutes a clear showing

that their interests, if any, are adequately represented.

Finally, we come to the requirement of Rule 24 that an application for intervention be timely made. The present application has been made almost twelve years after the action was commenced and almost three years after settlement reached. It has been noted:

> "But where there has been much litigation by way of motions, depositions and discovery, taking of testimony before a master, etc., tardy intervention will usually be denied."
> 3B Moores Federal Practice, 2 Ed. ¶ 24.13[1] and cases cited therein.

Rule 24 requires, with good reason, that a motion to intervene be accompanied by a proposed complaint in intervention. This appellants did not do, nor have they complied in any respect with Rule 24 in attempting to set out the basis for their motion to intervene. In any event, the Estate of Brandenburg is foreclosed from asserting any claim and, in the absence of the articulation of a specific ground on which Harry Berg can assert a claim, intervention does not lie.

As discussed above with respect to class actions, the basis on which applicants would claim to meet the requirements of Rules 23 or 23.1 should be set forth with particularity, which renders even more appropriate the requirement that appellants should have submitted a proposed complaint in intervention. In any event, neither proposed class --

creditors or stockholder -- were purchasers or sellers, and hence would have no independent claim in this action. Accordingly, intervention is not appropriate. See Solien v. Miscellaneous Drivers & Helpers Union, 440 F.2d 124, 132 (8th Cir. 1971), cert. denied, 403 U.S. 905 (1971) ("Intervention as of right presupposes that the applicant has a right to maintain a claim for relief sought.").

POINT IV

APPELLEE SUPERINTENDENT SHOULD BE AWARDED DAMAGES.

We respectfully submit that the instant proceeding is appropriate for the imposition of the sanctions provided for in Rule 38, F.R.A.P. Appellants have succeeded in delaying the final settlement of this litigation for over three years. The Superintendent has been deprived of the proceeds of the settlement (only $200,000 of the one million dollars has been placed in an interest-bearing escrow account) and the creditors denied final distribution.

The estate of MCC has further been subjected to additional legal expenses all arising out of completely frivolous claims by appellants. Four times in four different courts have appellants raised the same baseless arguments. Each time the arguments have been denied, twice in summary

fashion. Appellants have not had their day in court, they have had their day in five courts.

We do not suggest that any appellant should be subject to damages or costs merely because he employs the appellate remedies. But where, as here, the appeal is so clearly frivolous on its face, the imposition of sanctions provided for in Rule 38 is appropriate. Accordingly, we request that appellee Superintendent of Insurance be awarded just damages and/or double costs.

CONCLUSION

For all of the reasons set forth herein, the decision and order of the court below should be affirmed in all respects and damages and/or double costs awarded to appellee Superintendent of Insurance.

Respectfully submitted,

JOSEPH J. MARCHESO
Attorney for Appellee Superintendent
of Insurance

Of Counsel,

MORTON J. SCHLOSSBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, as Liquidator of Manhattan Casualty Company,

Plaintiff-Appellee,

v.

BANKERS [illegible] AND CASUALTY COMPANY, IRVING TRUST CO., BELGIAN AMERICAN BANKING CORPORATION, BELGIAN AMERICAN BANK & TRUST COMPANY, GARVIN BANTEL & COMPANY, NEW ENGLAND NOTE CORPORATION, THE ESTATE OF GEORGE K. GARVIN by RUTH N. GARVIN, THE ESTATE OF JAMES P. BEGOLE, by PATRICIA C. BEGOLE, as Executrix, JOHN F. SWEENEY, THE ESTATE OF STANDISH T. BOURNE, by STANDISH T. BOURNE, JR.,

Defendants-Appellees,

and

HARRY BERG and FLORENCE H. BRANDENBURG, Executrix,

Intervenors-Objectors-Appellants.

Index No. 75-7387

AFFIDAVIT OF SERVICE BY MAIL

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

VIOLET LITNER, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 740 Madison Avenue, New York, New York. On September 17, 1975, deponent served the within Brief of Plaintiff-Appellee upon the following at the addresses designated for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York:

NORMAN ANNENBERG, ESQ.
Attorney for Harry Berg and Florence H. Brandenburg
250 West 57th Street
New York, New York 10019

JACOBS, PERSINGER & PARKER, ESQS.
Attorneys for Bankers Life and Casualty Company
70 Pine Street
New York, New York 10005

WINTHROP, STIMPSON, PUTNAM & ROBERTS, ESQS.
Attorneys for Irving Trust Company
40 Wall Street
New York, New York 10005
Att: William Karatz, Esq.

SULLIVAN & CROMWELL, ESQS.
Attorneys for European-American Banking Corporation
and European-American Bank & Trust Company
48 Wall Street
New York, New York 10005
Att: Michael Maney, Esq.

SEITS & SHAPIRO, ESQS.
Attorneys for Garvin, Bantel & Co. and
Estate of George K. Garvin
110 East 42nd Street
New York, New York 10017

JILLSON, BEDFORD & HOPPEN, ESQS.
Attorneys for Estate of James F. Begole
115 Broadway
New York, New York 10006

NEW ENGLAND NOTE CORPORATION
c/o Clerk of the Court
United States District Court
United States Courthouse
Foley Square
New York, New York 10007

ESTATE OF STANDISH T. BOURNE
by Standish T. Bourne, Jr.
Standish T. Bourne, Jr.
R. D. #2
Allentown, Pa. 18102

JOHN F. SWEENEY
c/o Clerk of the Court
United States District Court
United States Courthouse
Foley Square
New York, New York 10007

Violet Litner
Violet Litner

Sworn to before me this
17th day of September, 1975

Norton J. Schlossberg

NORTON J. SCHLOSSBERG
NOTARY PUBLIC, State of New York